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ORIGINAL

Case No. 86-6169

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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January, 1987

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Petitioner,

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On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Oklahoma, by and through Robert H. Henry, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 720 P.2d 780 (Okla.Crim.App. 1986).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on August 29, 1986. A Petition for Rehearing was denied on September 24, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> All persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sates; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Okla. Stat. Ann. tit. 21, § 701.7 (West 1983) provides in part:

> A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. Ann. tit. 21, § 701.9 (West 1983) provides in part:

> A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) provides as follows:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. Ann. tit. 21, § 701.11 (West 1983) provides as follows:

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.12 (West 1983) provides as follows:

> Aggravating circumstances shall be:
> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
>
> 2. The defendant knowingly created a great risk of death to more than one person;
>
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;
>
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
>
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Okla. Stat. Ann. tit. 21, § 701.13 (West 1983) provides as follows:

> A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the

transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE FACTS

This case concerns the abduction and murder of one Charles Keene in Grady County, Oklahoma, during the early morning hours of Sunday, January 23, 1983. The evidence shows that Anthony James Mann, Bobby Joe Glass, Richard Jones, and the Petitioner participated in this murder. The Petitioner is co-defendant

Anthony Mann's younger brother. The Petitioner was born on March 4, 1967, so at the time of the murder, he was fifteen years old, a month and a half before his sixteenth birthday (O. R. 479).

On the afternoon before the night of the murder, Anthony Mann and Danny Mann, the Petitioner's half brother, were involved in an altercation with Charles Keene at Keene's trailer home in Amber, Oklahoma. The quarrel arose from one of the many matrimonial squabbles between Charles Keene and Vickie Keene, the Petitioner's sister, and Charles Keene's former wife, who had continued to reside with Charles (Tr. 588-84, 51, 603-04, 610-12, 614, 717). After the fight Vickie Keene purchased some ammunition for a .45 caliber pistol that Anthony Mann had given to her, and decided to spend the night in her mother's home in Chickasha, where the Petitioner also resided (See Tr. 509, 594, 599, 631, 702-703). Before going to bed she placed the gun on a shelf at the Thompson residence (Tr. 601).

That evening Anthony Mann, Rickey Jones, Bobby Glass and the Petitioner were all present in the Thompson residence, and left there together (Tr. 631-32). Before leaving the Petitioner told his girl friend, Donetta Bradford, who was a guest in the home that night, that they were going to get Charles (Tr. 687-86).

At approximately 2:25 a.m. on the morning of January 23, 1983, an individual named Malcolm (Possum) Brown was awakened by a gunshot coming from his front porch. Then he heard someone knocking on his front door shouting, "Possum, open the door, let me in. They're going to kill me" (Tr. 469-70). Brown lived two miles north of Chickasha near the Washita River (Tr. 468, 492). He went to his front door and observed several men beating one man on this front porch. The men left taking their victim with them while Brown was calling the police (See. Tr. 473-77, 494-95, 498).

Several hours after leaving the Thompson residence the Petitioner and the others returned (Tr. 632, 686). The Petitioner was wet from the chest down, visibly shaken, and had a bloody nose (Tr. 686-87). He talked to Donetta Bradford and said,

"we killed him. I shot him in the head and cut his throat and threw him in the river." (Tr. 687-88). The Petitioner made several other damaging admissions that morning and during the days that followed (See Tr. 567-68, 575-76, 634-35). Anthony Mann and Bobby Glass also made admissions that morning (Tr. 512, 514, 569, 571, 618-19). They made further incriminating statements in the course of their subsequent efforts to check on the body and dispose of the gun (Tr. 424, 521-22, 522-25).

On February 18, 1983, the body was recovered from the Washita river (Tr. 49). A concrete block was attached to the body by means of a log chain which was wrapped around the victim's legs (Tr.654; State's Exhibit No. 14). A subsequent autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). The victim had suffered numerous other cuts and injuries, all of which were inflicted before death (Tr. 661-662, 669). The police also eventually recovered the gun that Anthony Mann and Bobby Glass had attempted to dispose of, and determined that it was the murder weapon (Tr.387-388, 403-404, 402-408, 410, 412, 424, 677-678).

On February 18, 1983 the State filed charges of First Degree Murder regarding the death of Charles Keene, and warrants were issued for the arrest of defendant and the co-defendants (O. R. 1, 12-15). On February 20, 1983, the defendant and Anthony Mann were arrested in Eufaula, Oklahoma.

The jury found the Petitioner guilty of Murder in the First Degree in the first stage. In the second stage of the trial, the jury found one aggrevating circumstance, that the murder was especially heinous, atrocious or cruel. (Tr. 870).

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE ADMISSION INTO EVIDENCE OF COLOR PHOTOGRAPHS OF THE VICTIM DID NOT RENDER THE TRIAL OR SENTENCING OF THE PETITIONER SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

The Petitioner contends that his constitutional rights were violated by the admission into evidence of two color photographs

which were introduced into evidence. The State contends that this was a state evidentiary question and there is no showing that the admission of the evidence has rendered the trial so fundamentally unfair as to deny due process.

In Donnelly v.De Christoforo, 416 U.S. 367 (1974), this Court stated that not every trial error or infirmity which might call for the application of supervisory power constitutes a failure to observe fundamental fairness essential to the very concept of due process. 416 U.S. at 642, citing Lisenba v.California, 314 U.S. 219, 236 (1941). The Court noted that when specific guarantees of the Bill of Rights are involved, the Supreme Court has taken special care to insure that prosecutorial conduct in no way impermissibly infringes them. Id. at 643. But the Court stated that, regarding an alleged trial error, constitutional error would not be found unless the error so effected the trial with unfairness as to make the resulting conviction a denial of due process. Id. at 634.

This Court has recently held in two state cases that the alleged trial errors did not meet this requirement. See Darden v. Wainwright, 106 S.Ct. 2464 (1986) (prosecutors closing arguments were not fundamentally unfair); and Holbrook v. Flynn, 106 S.Ct. 1340 (1986) (security force present in courtroom was not prejudicial).

In the present case the Oklahoma Court of Criminal Appeals found that the evidence in this case was "strong". Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986). A review of the facts cited by the Court of Criminal Appeals that this is true.

This court has never ruled on the admissibility of allegedly gruesome photographs in a criminal trial. Cf. Lisenba v. California, 314 U.S. at 227-29 (Court rejects contention that bringing two rattlesnakes in the courtroom prejudicied the defendant's rights). The Petitioner has failed to state why these particular photographs are of such importance that this court should grant certiorari and review his conviction and sentence.

Furthermore, this issue can be reviewed by a federal district court in a habeas proceeding, which is better equipped to review the photographs and determine whether the admission of such constituted a denial of fundamental fairness. See Nettles v. Wainwright, 667 F.2d 410, 414-15, (5th Cir., 1982). See also Evans v. Thigpin, 631 F.Supp. 274, 288-89 (S.D.Miss. 1986); and Godfrey v. Francis, 613 F.Supp. 747, 761 (N.D.Ga. 1985). Cf. Osborne v. Wainwright, 720 F.2nd 1237 (11th Cir. 1983).

PROPOSITION II

A STATE MAY CONSTITUTIONALLY IMPOSE THE DEATH PENALTY UPON A PERSON WHO WAS SIXTEEN YEARS OLD AT THE TIME OF THE COMMISSION OF THE CRIME WHEN THE STATE HAS MADE THE DETERMINATION, AND THAT CONCLUSION IS SUPPORTED BY THE EVIDENCE, THAT THE PETITIONER INTENTIONALLY COMMITTED THE CRIME OF MURDER.

A. The objective factors existing in Oklahoma and other states preclude a finding by this Court that Oklahoma is attempting to impose a Cruel and Unusual Punishment upon the petitioner.

The Petitioner, in his second proposition, urges this Court to adopt as an aspect of the United States Constitution, the principle that the imposition of the death penalty upon a person who was fifteen years old at the time of the commission of an intentional murder, constitutes cruel and unusual punishment per se.

With regard to the review of punishments under Eighth Amendment principles, this Court has noted that a "heavy burden rests upon those who would attack the judgment of the representatives of the people" and that the Court will presume the validity of a punishment of a democratic legislature. Gregg v. Georgia, 428 U.S. 153, 175 (1976). Furthermore, in Coker v. Georgia, 433 U.S. 584 (1977), Justice White stated:

> These Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment would be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence - history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted . . .
> 433 U.S.at 592.

This Court has been reluctant to impose inflexible rules on the states' criminal justice procedures. See Barker v. Wingo, 407 U.S. 514, 522-25 (1972). With regard to Eighth Amendment judgments, this Court has refused to become engaged in "the basic line-drawing process that is preeminently the province of the legislature . . . " Rummel v. Estelle, 445 U.S. 263, 275, (1980).

This Court has repeatedly recognized that "we may not act as judges as we might as legislators," Gregg v. Georgia, supra, 428 U.S. at 175 (Stewart, J., plurality opinion), and that the Constitution has not given this Court a "roving commission" to impose upon the states its own motion of enlightened policy. Rummel v. Estelle, supra, 445 U.S. at 285 (Stewart, J., concurring). The subjective views of individual Justices should not be the basis of Eighth Amendment judgments. Rhodes v. Chapman, 452 U.S. 337, 346, (1981); Furman v.Georgia, supra, 408 U.S. at 405-06 (Blackman, J., dissenting). Additionally, this Court has acknowledged that a decision by the Supreme Court "that a given punishment is impermissible cannot be reversed short of a constitutional amendment." Gregg v.Georgia, supra, 428 U.S. at 176.

In Barker v. Wingo, supra, 407 U.S. 514 (1972), this Court rejected a suggestion that it adopt a specific time period within which a defendant must be offered a trial. Noting that such a rule was recommended by the American Bar Association, the Court stated:

> "(s)uch a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise".

407 U.S. at 523.

B. The legislature of a state is the proper forum for establishing guidelines for determining criminal responsibility and accountability and if there is evidence supportive of such a finding in an individual case the State should be allowed to impose the death penalty for an act of intentional murder.

The complexities involving the appropriate criminal sanctions for juveniles also weigh heavily against this Court setting a fixed line beneath which a state may never go in determining what is the proper age for assessing the death penalty in a particular case. The great variance between maturity levels of individual adolescents was previously noted by Justice Powell in his dissent in Fare v. Michael C., 442 U.S. 707 (1979), where he stated:

> Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, (citation omitted), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotion and mental stability, and, of course, any prior record he might have.

442 U.S. at 734, n.4

The adoption of the "totality of the circumstances" test regarding the admissibility of juvenile confessions by the majority in Fare is in itself a recognition by this Court of the differing types of juveniles a system of justice will confront. The majority in Fare stated this test "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifty Amendment rights and voluntarily consents to interrogation." 442 U.S. at 725-26.

In the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), it was noted:

> It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals.

p. 119

and later,

> No chronological age bracket is uniformly indentical or entirely homogenous." p. 120.

The existence of certification, waiver, and transfer

statutes in various states, is in itself a recognition of the necessity of making individual determinations concerning criminal responsibility in cases involving young offenders. This Court has noted that "an overwhelming majority of jurisdictions permits transfer in certain instances." Breed v. Jones, 421 U.S. 519, 535 (1975).

Nothing in the Eighth Amendment implies that a person's chronological age should be anything more than a factor for the sentencing authority to consider when imposing sentence. As long as the state does not interfere with the sentencer's ability to take age into account when making the decision whether to impose the penalty of death, and if the evidence supports the decision that the defendant is accountable as defined by applicable state law, the sentence should be upheld.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 21st day of January, 1987, a true and correct copy of the foregoing was mailed, postage prepaid, to:

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